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store building he rented, books kept by the double-entry method were admissible in evidence, although they contained items as to merchandise, which complainant did not regularly deal, bought for defendant from other merchants.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 98.]

3. Evidence (§ 354 (9)*—Books of Account—Cash Payment.—Books of account are admissible in evidence to show small cash payment made in the course of business in accordance with the previous custom of the parties.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 98.]

4. Gifts (§ 47 (1)*—Work and Labor (§ 7 (1)*—Services and Payments by Members of Family—Presumption.—The presumption that services and payments by one member of a family for or to another member of a family are gifts is overcome, where charges are regularly made and accounts rendered.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 724-5; 7 Va.-W. Va. Enc. Dig. 304-9.]

5. Evidence (§ 75*—Failure to Produce—Inference.—Where an account was referred to a commissioner, it was the duty of defendant, if he knew of any evidence to sustain his allegations, to produce it, or at least give the names of the witnesses, and where he failed to do so it will be inferred that no such evidence existed.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 98.]

Appeal from Corporation Court of Staunton.

Suit by A. T. Higginbotham against B. F. Buchanan, administrator of Laura T. Higginbotham, deceased. Decree for complainant, and defendant appeals. Affirmed.

Timberlake & Nelson and *Chas. Curry*, all of Staunton, for appellant.

J. M. Perry, of Staunton, for appellee.

TURK v. MARTIN.

Nov. 14, 1918.

[97 S. E. 349.]

1. Assault and Battery (§ 35*—Action for Damages—Provocation—Evidence.—In action for damages for personal injuries resulting from an alleged felonious assault, evidence held to justify finding that plaintiff said or did nothing that would justify assault.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 739.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

2. Assault and Battery (§ 12*)—Justification—Offensive Language.—Previous conduct and offensive language at the time would not justify alleged felonious assault.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 743.]

3. Trial (§ 252 (8)*)—Instruction on Immaterial Matter—Refusal.—Where defendant could not justify assault on the ground that it was necessary in defense of his property, the claim that plaintiff was not defendant's tenant, covered by defendant's instruction, which was refused, was immaterial.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

4. Appeal and Error (§ 843 (2)*)—Review—Matter Not Necessary to Decision.—Since the jury could not properly have found any other than a verdict for plaintiff, instructions given and refused need be considered only in so far as they affect measure of damages.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600, 604.]

5. Trial (§ 295 (11)*)—Erroneous Instruction—Cure by Charge as a Whole.—Although instructions that, if defendant made a premeditated, willful, or malicious assault upon plaintiff, the jury should award plaintiff punitive damages, was erroneous, because using the word "should," instead of "may," defendant was not prejudiced thereby, in view of the instructions as a whole.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 601.]

6. Damages (§ 87*)—Exemplary Damages—Right to Recover.—The weight of authority is to the effect that exemplary damages are not recoverable as a matter of right.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 742.]

Error to Circuit Court, Augusta County.

Action by J. F. Martin against R. S. Turk. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

R. S. Turk and *Chas. Curry*, both of Staunton, for plaintiff in error.

Jos. A. Glasgow, of Staunton, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.